

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to:

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from:

Sean Dwyer
Assistant to Branch Chief, Branch 3
(Income Tax & Accounting)

subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =

Sub =

National Park =

Claim A =

Mineral A =

Date 1 =

Date 2 =

Year 1 =

Year 25 =

Year 30 =

\$a =

ISSUE

Is the location of a substantial portion of donated property within the boundaries of a national park a factor affecting the determination of the property's fair market value under § 170 of the Internal Revenue Code?

CONCLUSION

If the location of a substantial portion of donated property within the boundaries of a national park results in a restriction on the property's highest and best use, the restriction is a factor affecting the fair market value of the property. The fair market value must reflect the restriction or the cost of removing the restriction, so long as the highest and best use that is restricted, still has a strong possibility of achievement and is not remote, speculative, or conjectural.

FACTS

On Date 1 (Year 30), Sub, a wholly owned subsidiary of Taxpayer, donated land and mineral rights located in National Park to the National Park Service. A majority of the donated property is located within National Park. Taxpayer filed its Year 30 return on Date 2 and claimed a charitable contribution deduction of \$a for the donated property based on two appraisals. The donated property consists of the Claim A patented claims of Mineral A mineralization, patented long ago. In 1976, Congress passed the Mining in Parks Act, which closed National Park to filing of new mining claims and began to phase out mining in National Park. In Year 1, mining resumed on a limited basis with stricter environmental standards. Mine operators were required to obtain approval for a plan of operations which would mitigate damage to the environment. In Year 25, the last of the mines in National Park closed.

LAW AND ANALYSIS

Deductions are a matter of legislative grace and a taxpayer must satisfy the specific statutory requirements of the deductions he claims. Indopco, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); Deputy v. du Pont, 308 U.S. 488 (1940); New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934). Taxpayers bear the burden of proving entitlement to the deductions they claim. Welch v. Helvering, 290 U.S. 111 (1933).

Section 170 allows a deduction for any charitable contribution (as defined in subsection (c)) made within the taxable year.

Section 1.170A-1(c)(1) of the Income Tax Regulations provides that if a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution.

Section 1.170A-1(c)(2) provides that fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

The fair market value of property is determined on the basis of a hypothetical willing buyer and a hypothetical willing seller (the characteristics of these hypothetical persons are not necessarily the same as the personal characteristics of the parties to the transaction), and reflects its highest and best use as of the date of its valuation. See, Cohan v. Commissioner, T.C. Memo. 2012-8 and the authorities cited therein. The fair market value of property is not affected by whether an owner has actually put the property to its highest and best use. The reasonable and objective possibilities for the highest and best use of property control its value. See United States v. Meadow Brook Club, 259 F.2d 41, 45 (2d Cir. 1958); Stanley Works & Subs. v. Commissioner, 87 T.C. 389, 400 (1986). A potential highest and best use for the property can be considered even though the potential use is prohibited on the valuation date by some restriction in a deed, statute or zoning regulation. Thornton v. Commissioner, T.C. Memo. 1988-479, citing Ebben v. Commissioner, T.C. Memo. 1983-200, *aff'd. on this issue* 783 F.2d 906, 910 (9th Cir. 1986). In such a case the proper approach is to value the property at its highest and best use even though its highest and best use is prohibited at the date of valuation by the applicable restriction and then to proceed to reduce or discount such value by a reasonable estimate of the cost of removing the restriction and for the time needed to accomplish such removal. Thornton v. Commissioner, *supra*. However, the projected highest and best use must have a strong possibility of achievement. It should not be remote, speculative or conjectural. See Olsen v. United States, 292 U.S. 246, 257 (1934); McGovern v. New York, 229 U.S. 363, 372 (1913). See also Crock v. Commissioner, T.C. Memo. 1983-351 and Fiske v. Commissioner, T.C. Memo. 1984-494.

Exam must determine if the donated property's highest and best use is for mining of mineral A and what restrictions the Mining in Parks Act and other relevant legislation and regulations place on the ability of a potential owner to use the property for mining of mineral A. It must reduce or discount the fair market value based on use for mining Mineral A by a reasonable estimate of the cost of removing the legal restrictions on such use and for the time needed to accomplish their removal. Exam must determine if the possibility of removing the legal restrictions on mining the property is likely to be achieved or if it is remote, speculative, or conjectural.

If Exam concludes that the property only has value as a mine, and that due to the restrictions on mining the property is worthless, Exam should consider whether the property became worthless in Year 25 when mining operations ceased in National Park.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS

This Chief Counsel Advice addresses only the facts pertaining to the Taxpayer. This office does not opine on any situation outside the facts set out above.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call me or Lewis Saideman at (202) 622-4950 if you have any further questions.